

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation	)	
of the	)	
	)	
DEPARTMENT OF FAIR EMPLOYMENT	)	Case No. E 95-96
AND HOUSING	)	A-0343-
	)	
v.	)	00-se
	)	E 95-96
	)	A-0343-
LAKE COUNTY DEPARTMENT OF HEALTH	)	01-s
SERVICES; and ROBERT MORGAN, as	)	
an individual,	)	98-11
	)	
Respondents.	)	
-----	)	
-	)	DECISION
KAREN MICHELLE ACKER,	)	
	)	
Complainant.	)	

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The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the decision as precedential, with the exception of the discussion of retaliation found at pages 29 through 31, pursuant to Government Code sections 12935, subdivision (h), and 11425.60.

Commissioner Beebe has filed a separate concurring opinion. Commissioner Johnson has filed a separate concurring and dissenting opinion.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition

for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

DATED: July 22, 1998

FAIR EMPLOYMENT AND HOUSING COMMISSION

LYDIA I. BEEBE

PHYLLIS W. CHENG

ANN-MARIE VILICANA

CONCURRENCE

I concur in the Commission's decision, but have misgivings about the part of the decision that holds respondent Morgan liable as a "person" for retaliating against complainant in violation of Government Code section 12940, subdivision (f). It is not clear whether section 12940, subdivision (f), extends to a non-supervisory co-worker's retaliatory conduct, where that conduct does not result in an adverse employment action against the complainant.

LYDIA I. BEEBE

CONCURRENCE AND DISSENT

I join in the Commission's decision, except for the determination that respondent Morgan violated Government Code sections 12940, subdivision (f) (retaliation), and 12948 (Ralph Civil Rights Act). I do not believe that the Department established the causal connection between complainant's gender

and respondent Morgan's intimidating conduct necessary to establish a violation under either of these provisions.

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THERON E. JOHNSON

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-	)	PROPOSED DECISION
KAREN MICHELLE ACKER,	)	
	)	
Complainant.	)	

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Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on December 9 through 12, and December 15 through 17, 1997, in Lakeport, California. Michael F. Sweeney, Senior Staff Counsel, represented the Department of Fair Employment and Housing. Anita L. Grant, Deputy County Counsel, represented respondent Lake County Department of Health Services. Respondent Robert Morgan represented himself. Respondent Morgan and complainant Karen Michelle Acker were present during all days of hearing. The record was held open for the filing of post-hearing briefs. The parties timely filed post-hearing briefs, and the case was submitted on May 11, 1997.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

## FINDINGS OF FACT

1. On September 27, 1995, Karen Michelle Acker filed a written, verified complaint with the Department of Fair Employment and Housing (Department or DFEH) against Lake County Alcohol and Other Drug Services and Robert Morgan. The complaint alleged that, within the preceding year, Robert Morgan, a substance abuse counselor for Lake County Alcohol and Other Drug Services, discriminated against complainant on the basis of her sex, female, in violation of the Fair Employment and Housing Act (Act or FEHA) (Gov. Code, §12900, et seq.). The complaint asserted that Robert Morgan verbally and physically sexually harassed complainant.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h), of the Act. On September 26, 1996, Nancy C. Gutierrez, in her official capacity as the Director of the Department, issued an accusation against Lake County Department of Health Services (respondent Health Services) and Robert Morgan (respondent Morgan). The accusation alleged that respondents subjected complainant to disparate treatment on the basis of her sex, discriminated against complainant on the basis of her sex, female, by subjecting her to verbal, visual, and physical sexual harassment, and retaliated against complainant when she complained about the harassment, in violation of Government Code section 12940, subdivisions (a), (f), and (h)(1).

The accusation also alleged that respondents failed to take all reasonable steps to prevent harassment from occurring, in violation of section 12940, subdivision (i). Finally, the accusation alleged that respondent Morgan violated the Ralph Civil Rights Act, Civil Code section 51.7, as incorporated into the Act through Government Code section 12948, by subjecting complainant to violence, intimidation and threats of violence because of her sex.

3. On October 10, 1996, the Department issued a First Amended Accusation against respondents. The First Amended Accusation added a request that respondent Morgan be ordered to pay an administrative fine

4. Respondent Health Services, a program of Lake County, is an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (h)(1) and (h)(3)(A).

5. Respondent Morgan is a "person" within the meaning of Government Code section 12925, subdivisions (d), Government Code section 12940, subdivisions (f) and (h)(1), and Civil Code section 51.7.

6. Alcohol and Other Drug Services (AODS), a division of respondent Health Services, provides counseling for individuals who have drug or substance abuse problems. AODS has two offices -- headquarters in Lakeport, California and a satellite office in Clearlake, California. At all times relevant herein, Glen Walters was the Director of Personnel for Lake County, Robert Erickson was the Director/Department Head of respondent Health Services, and Albert Rodriguez was the Program Director of AODS.

7. Albert Rodriguez supervised both AODS offices but worked out of the Lakeport office. As Program Director, Rodriguez had primary administrative responsibility for AODS operations, including staff supervision, program activities, and development. Laura Solis, Ester Tarin, and Diane Askew, all senior substance abuse counselors, also were "coordinators" who supervised AODS office work and other AODS personnel. As coordinators, they met periodically with Rodriguez.

8. In or around April 1992, respondent Health Services hired complainant as an office assistant in the AODS Clearlake office. Albert Rodriguez was complainant's direct supervisor. As an office assistant, complainant answered telephones, filled out crisis intake forms, did some bookkeeping, and performed other clerical tasks. Complainant did not do any substance abuse counseling.

9. Unlike the AODS counselors, complainant did not have her own office, but instead worked at a desk located against a wall in an open area. As part of her job, complainant used the filing cabinets on a daily basis.

10. At her time of hire, and throughout these proceedings, complainant was married to Steven Acker. They have four children.

11. In or around March 1994, respondent Health Services hired respondent Morgan as a substance abuse counselor in the AODS Clearlake office. Laura Solis, a senior counselor, was Morgan's coordinator and Albert Rodriguez was his supervisor. Morgan, an ex-felon who had been incarcerated for a murder conviction, was on parole at the time of hire. It was common knowledge among the AODS staff, including complainant, that Morgan had been imprisoned for the murder conviction.

12. Complainant and respondent Morgan were co-employees. They also were the only AODS employees who worked full-time in the Clearlake office. Other AODS employees worked in this office intermittently. Consequently, complainant and respondent Morgan were often alone together in the Clearlake office. Laura Solis worked out of the Lakeport office, but scheduled time to be at the Clearlake office "as needed."

13. When respondent Morgan began working at AODS, complainant and Diana Askew, one of the senior counselors, attempted to welcome him and make him feel comfortable. At times, the three of them had a friendly relationship in the office, talking and telling jokes.

14. On January 3, 1995, Glen Waters, Director of Personnel, circulated the County's sexual harassment policy to all County Department Heads, including Robert Erickson. Erickson, in turn, distributed the policy to all Division Heads, including Albert Rodriguez. The complaint procedure in the sexual harassment policy provided as follows: A person with a sexual harassment complaint shall discuss the complaint with his or her immediate supervisor or department head, who, in turn, may conduct a brief informal investigation and shall attempt to resolve the complaint informally. The immediate supervisor or director shall explain to a harassment victim that he or she has the right to file a discrimination complaint in addition to or as an alternative to the County's complaint procedure. If the complaining party is not satisfied with the results of the informal investigation, he or she can file a formal written complaint with the County Personnel Director.

15. Beginning in January 1995, and periodically thereafter, respondent Morgan physically blocked complainant's access to the filing cabinet, forcing her to push by him and come into contact with his body in order to reach the filing cabinets.

After this happened on a number of occasions, respondent Morgan accused complainant of trying to rub her "tits" against him and told her that he could not be responsible for what would happen because of her behavior. Complainant did not intend or want to come into physical contact with respondent Morgan or rub against him, but was trying only to complete her filing.

16. In or around February or March 1995, complainant brought a cheesecake for everyone at the office. Respondent Morgan responded by stating to complainant that he loved cheesecake, and that, by bringing it, complainant could "have her way with him" and that he could give her an orgasm. Complainant tried to ignore these comments.

17. Around this same time, when complainant asked respondent Morgan to cover the telephones so that she could go to the restroom, respondent Morgan responded by saying, "Oh, can I watch?" and "Do you need some help?" Complainant tried to ignore these comments.

18. In or around March 1995, respondent Morgan suggested that he and complainant have a sexual liaison either at his home or at a motel. He said he could make her "come real good." She told him that she was not interested.

19. Around this same time, respondent Morgan told complainant that it would be fun to have a "menage-a-trois." He also told complainant that he wanted her to touch her "pussy" and wanted to know what it felt like to do so. Respondent Morgan also used sexually derogatory language in complainant's presence such as the words "motherfucker," "fuck," "tits," "pussy," and "bitch."

20. Beginning on March 30, 1995, respondent Morgan worked one night a week as a group facilitator for "Alternatives to Violence," a privately operated program for domestic violence offenders. At that time, Taira St. John was the director of the

program and acted as a co-facilitator, along with respondent Morgan.

21. Around this same time, the relationship between respondent Morgan and his coordinator, senior counselor Laura Solis, was strained. Throughout the month of April, Morgan made threatening remarks about Solis to complainant, including remarks such as, "I don't like being backed into a corner and when I am, I want to fight back," and, "Where I come from, people don't backstab you or else you'll be killed."

22. In April 1995, respondent Morgan asked complainant to ride in his car with him to the bank during the noon hour. Afraid to refuse him, and believing it would be a short ride, complainant agreed. While they were in the car, respondent Morgan reached over and put his hand up her dress. Complainant immediately grabbed his hand, pulled away from him, and said "no."

23. One evening toward the end of April 1995, complainant called Albert Rodriguez at his home to talk about respondent Morgan. She placed the call from her home because her office desk afforded no privacy. When she made the call, her husband was in the same room. During the telephone conversation, complainant told Rodriguez about respondent Morgan's sexual remarks toward her and his threats towards Laura Solis. Complainant did not, however, detail Morgan's sexual conduct at that time. During the telephone conversation, Rodriguez told complainant to write him a memorandum stating that respondent Morgan had made inappropriate comments.

24. Around this same time, complainant told senior counselor Laura Solis about Morgan's threats regarding Solis and on May 2, 1995, Solis wrote a memorandum to Rodriguez which memorialized that complainant had talked to her. In her memorandum, Solis also noted that in April she had counseled respondent Morgan after he had used the word "fuck" 14 times during a one hour counseling group.

25. On May 2, 1995, in response to Albert Rodriguez's request, complainant sent a memorandum to Rodriguez, stating that she was concerned about a "staff member" who, throughout April, had made statements to her which made her feel uncomfortable.

Complainant used the term "staff member" because she sent the memorandum through inter-office mail, which could be read by anyone, including respondent Morgan. In the memorandum, complainant also requested a meeting with Rodriguez to discuss her concerns.

26. After receiving complainant's memorandum, Rodriguez told complainant that he needed more details concerning Morgan's remarks about Laura Solis. Therefore, on May 5, 1995, complainant wrote another memorandum to Rodriguez, detailing respondent Morgan's threatening remarks about Laura Solis. In the memorandum, complainant also stated that she was concerned about comments respondent Morgan had made to his clients in complainant's presence, including the following: "That Mother Fucker is lucky I am on parole because [i]f I wasn't, I'd kill him for treating her the way he does. He's slime and the only reason he came in here, 'cause (sic) the inmates told him I was lookin' for his ass." Additionally, in the memorandum, complainant stated that she had observed respondent Morgan talking to adolescent clients and stating, "Hey, chill, it sounds like you're having an orgasm."

27. Thereafter, Rodriguez had a telephone conversation with respondent Morgan and asked Morgan if he had made the statements detailed in complainant's May 5, 1995, memorandum. Respondent Morgan told Rodriguez that he had made similar comments. Rodriguez also had an in-person meeting with respondent Morgan and Laura Solis. During the meeting, Rodriguez told Morgan that complainant had reported his threats.

28. Shortly after learning that complainant had complained about him to Rodriguez, respondent Morgan became distant and cold to complainant, while, at the same time, making his presence felt in her work area. When in her work area, he came close to her and did not move away, hovered over her, made rude comments and interrupted her work. Respondent Morgan told complainant that she did not understand the rules and was not from the "same school" as he was. Respondent Morgan also told complainant that, where he comes from, if an individual "snitch[es] on someone, he gets even." Complainant felt very intimidated by respondent Morgan's conduct.

29. Thereafter, respondent Morgan continued to exhibit hostility toward complainant. Morgan was cold, short-fused and argumentative. This conduct intimidated complainant, making her feel very frightened. As a result, she found it difficult to do her work.

30. By May 1995, respondent Morgan no longer made sexual advances or specific sexual comments directed toward complainant. He continued to use sexually derogatory language in her presence, however, and engaged in threatening behavior toward her through October 1995.

31. By June 1995, Taira St. John, director and Morgan's co-facilitator, had become dissatisfied with respondent Morgan's work performance at Alternatives to Violence. On June 21, 1995, she called him at work to talk about her concerns. During that telephone conversation, respondent Morgan called her a "cunt" and "bitch." Respondent Morgan threatened St. John, whispering in a hissing tone, "You'll be sorry, lady," and "I need that job." This conversation "scared the daylights" out of St. John, prompting her to change the locks on her door and to report respondent Morgan's behavior to the Lake County Sheriff's Office. Thereafter, St. John terminated respondent Morgan's employment with Alternatives to Violence.

32. On approximately June 25, 1995, Albert Rodriguez called Taira St. John. During the telephone conversation, St. John told Rodriguez how respondent Morgan had repeatedly verbally abused her, including calling her a "cunt," and how he had threatened her.

33. On June 26, 1995, complainant orally told Albert Rodriguez that respondent Morgan had been hostile toward her after learning that she had complained about him. Complainant told Rodriguez that she was uncomfortable working in the same office with respondent Morgan and asked for a transfer to the Lakeport office. During this conversation, complainant reminded Rodriguez about their April telephone conversation and, for the first time, told Rodriguez about respondent Morgan putting his hand up her dress. Rodriguez responded by telling complainant that she had probably misinterpreted respondent Morgan's advances.

34. On June 27, 1995, complainant put her transfer request in writing to Albert Rodriguez. She memorialized how respondent Morgan had been hostile toward her and indicated that a transfer would allow her to avoid any encounters with Morgan.

35. On July 20, 1995, complainant saw Dr. Caroline Knowles, a licensed clinical psychologist. In that session, complainant told Knowles about a number of incidents with respondent Morgan, including Morgan's remarks about complainant rubbing her breasts against him, his suggesting that they have a sexual relationship, and his putting his hand up her dress. Complainant also told Knowles that she had complained to Rodriguez, but that Rodriguez had taken no action, except to inform Morgan about her complaints. During the session, complainant was shaking and tearful. Knowles, who had seen complainant periodically since 1988, found complainant to be "acutely stressed and depressed."

36. On July 24, 1995, Albert Rodriguez observed complainant on the verge of tears during a break from a staff meeting at the Lakeport office. Rodriguez asked complainant to come into his office, which she did. Complainant again told Rodriguez that she felt anxious working in the Clearlake office. She also explained that her anxiety was due to her distrust of respondent Morgan, in light of his unwanted sexual comments and advances toward her. Complainant expressly complained to Rodriguez of three previous sexual actions by respondent Morgan -- Morgan's assertion that she was rubbing her breasts against him; his suggestions to her about a sexual liaison; and his putting his hand up her dress while they were in his car. Complainant told Rodriguez that respondent Morgan's conduct made her tense, angry and frightened. Complainant also told Rodriguez that she had seen a chiropractor for tension in her muscles and jaw. During the conversation, complainant again said she wanted to be separated from Morgan. Rodriguez told complainant that he would investigate the matter.

37. Albert Rodriguez treated complainant's July 24, 1995, remarks as a verbal complaint against respondent Morgan regarding these three sexual incidents and, as of that date, began an informal investigation of those incidents, which included a number of discussions with complainant. By July 31, 1995, Rodriguez understood that complainant wanted respondent

Morgan's conduct to stop, and understood that if the conduct did not stop, complainant wanted to be separated from respondent Morgan.

38. On July 25 1995, Rodriguez spoke with respondent Morgan on the telephone about these three sexual incidents. Respondent Morgan denied all of the behavior. Rodriguez scheduled an August meeting with respondent Morgan.

39. From July 26 through approximately August 6, 1995, respondent Morgan was absent from work due to a previously scheduled vacation.

40. On July 31, 1995, Rodriguez sent a memorandum to Robert Erickson, Director of respondent Health Services, with a copy to respondent Morgan and complainant. In the memorandum, Rodriguez informed Erickson about the three sexual incidents which complainant had reported to him on July 24th. The memorandum also summarized complainant's emotional reaction, memorializing complainant's reports of feeling tense, emotional, angry, scared, and distrustful of Morgan. The memorandum stated that complainant had "some interest" in attempting to resolve the matter informally, but if such efforts were not successful, she had requested to be separated from respondent Morgan. The memorandum also stated that Rodriguez would follow up by August 11, 1995, with recommendations for "corrective action."

41. On August 8, 1995, Rodriguez wrote a memorandum to the AODS staff, with a copy to Robert Erickson. In the memorandum, Rodriguez stated that, for some time, staff had discussed the need for a designated "lead" employee and the need for increased supervision at the Clearlake office. Rodriguez stated that he had taken two actions: first, to designate Esther Tarin as "lead" coordinator for the Clearlake office and second, to assign Laura Solis to work at the Clearlake office on Tuesdays.

42. Thereafter, Esther Tarin acted as "lead" co-coordinator at the Clearlake office. Her physical presence in this office, however, was the same as it had always been -- i.e., she continued to work at the Lakeport office on Mondays and Tuesdays, while working at the Clearlake office the rest of the

week. Additionally, when Rodriguez assigned Tarin to be "lead," he did not assign her to monitor respondent Morgan.

43. On August 10, 1995, complainant sent a memorandum to Rodriguez, stating that the three sexual incidents described in Rodriguez's July 31st memorandum were only examples of respondent Morgan's behavior. She stated that other examples of respondent Morgan's sexual harassment included making remarks about "having his way with her" when she brought cheesecake to the office and remarks about his watching/helping when she went to the restroom. Complainant also said that on June 26th she thought she had been "clear" to Rodriguez "on how uncomfortable" she was about the car incident. Complainant commented that the car incident "violated the work rapport as well as impacted the work place." She also told Rodriguez that she remained afraid of Morgan, did not want to work with him, and reiterated that she had requested a transfer so that she could be away from Morgan permanently.

44. In the same August 10, 1995, memorandum to Rodriguez, complainant specifically reported that respondent Morgan's conduct resulted in her experiencing nightmares, sleep deprivation, intense headaches, upper abdominal pain, diarrhea, and increased absences from work. She stated that when respondent Morgan got close to her in her work area, she had anxiety attacks, with her heart pounding, body trembling, breathing difficult, and her voice weakening. Complainant also reported that, during the previous four months, respondent Morgan's behavior had been unwelcome and had made her feel angry, hurt, confused, dirty, and violated. She stated that his conduct, as well as her emotional response to it, was ongoing.

45. By this time, respondent Morgan's conduct led complainant to have nightmares. In one nightmare, respondent Morgan chased her in the office while carrying a bag of rats which he dumped onto her body and the rats ate her. Complainant became unable to sleep, which made it difficult for her to be efficient at work. She had intense headaches on a daily basis and experienced upper abdominal pain. She also had diarrhea. At home, she became unable to help her children with tasks, such as homework, which she had easily done before.

46. By August 7 or 8, 1995, respondent Morgan returned from his vacation and intensified his hostile behavior toward complainant. He continued to make his presence felt in her work area, abruptly throwing files on her desk and making rude and short comments in a hostile tone of voice. Complainant asked him to discontinue this behavior but the behavior continued.

47. On August 11, 1995, Albert Rodriguez sent another memorandum to Robert Erickson, stating that he had not yet developed recommendations about complainant's complaint but that he would attempt to do so by August 21, 1995. Rodriguez forwarded a copy of the memorandum to complainant and respondent Morgan.

48. From August 12, 1995, through August 30, 1995, Rodriguez was out of the office, with the exception of approximately two hours on August 18, 1995.

49. On August 18, 1995, respondent Morgan sent a memorandum to Albert Rodriguez and Robert Erickson, addressing the three sexual incidents described in Rodriguez's July 31st memorandum. In this memorandum, Morgan denied that he had suggested a sexual liaison with complainant. Morgan conceded that complainant's breasts had rubbed against him yet asserted that he was the one who was being harassed by this conduct. Morgan also admitted that he had put his hand on complainant's thigh while they were in his car and that she had rebuked him. He explained that this touching was his attempt at "reverse psychology," -- i.e., his attempt to demonstrate to complainant that she was not interested in having a relationship with him.

50. During his investigation of complainant's complaint, Albert Rodriguez never asked respondent Morgan about some of the incidents which formed the basis of complainant's complaint, including the previously described "cheesecake" and "bathroom-related" remarks.

51. By August 21, 1995, Albert Rodriguez still had not issued any formal recommendations in response to complainant's complaint.

52. By August 22, 1995, respondent Morgan had escalated his hostile conduct toward complainant. Complainant

found this behavior intimidating, hostile and offensive. When complainant and Morgan were alone in the office, he came into her work area and stayed there, standing over her while she was behind her desk or at the copy machine. He also sat at her desk, using her office typewriter, telephone and office supplies. When someone else came into the Clearlake office, Morgan stopped this conduct and left complainant's work area.

53. On August 31, 1995, complainant sent a memorandum to Rodriguez, Laura Solis, and Esther Tarin. The memorandum stated that in August, respondent Morgan continued to "invade" her office space and the memorandum detailed respondent Morgan's behavior in her work area. In the memorandum, complainant also stated that she believed the workplace was unhealthy and unsafe for her, and that respondent Morgan's behavior was threatening to her.

54. In or around September 1995, Rodriguez interviewed county employees Susan Smith and Gina Nielson. After interviewing both of them, Rodriguez felt that neither individual corroborated complainant's allegations.

55. On September 29, 1995, Rodriguez sent memoranda to both complainant and respondent Morgan, with a copy to Robert Erickson. Rodriguez acknowledged receipt of complainant's and respondent Morgan's August memoranda, and said he would prepare a final report to Robert Erickson about complainant's complaint.

56. During August, September and October 1995, complainant and respondent Morgan continued to work at the Clearlake office, at times with no one else in the office.

57. On or shortly before October 3, 1995, Rodriguez learned that complainant had filed a discrimination complaint with the DFEH against both respondent Health Services and respondent Morgan, alleging sexual harassment by respondent Morgan.

58. On October 3, 1995, Rodriguez sent a formal response and summary of his informal investigation to Robert Erickson, complainant, and respondent Morgan. In the memorandum, Rodriguez stated that he had investigated complainant's allegations, but was unable to substantiate either complainant's

or respondent Morgan's position. Rodriguez stated that he attempted to minimize the possibility of new incidents by strengthening office supervision, but that he continued to receive complaints from complainant and respondent Morgan about each other. Rodriguez acknowledged that having complainant and Morgan work in the same office was "unrealistic," but that he was unable to change things because of "the nature of our services."

Rodriguez made three recommendations: 1) to review and reaffirm the duties and responsibilities of each employee and "the parameters of their need to interact with each other" by October 20, 1995; 2) "to [e]stablish a rotational schedule of office assignments," with Rodriguez reviewing current assignments and initiating reassignments by October 31, 1995; and, 3) to schedule an in-service training on sexual harassment to take place by November 30, 1995. Robert Erickson approved these recommendations.

59. While Albert Rodriguez implemented the first recommendation made in his October 3, 1995, memorandum, he did not implement the second recommendation because Morgan was transferred. He did not implement his third recommendation until the following year.

60. On October 6, 1995, complainant and respondent Morgan were alone in the Clearlake office. While in the office, complainant overheard respondent Morgan on the telephone, using her name and saying he did not understand why she had complained about him. He also said that he was "going to get this bitch," and that somehow he would find a way to "get back" at her. Complainant became scared, panicked, and left the office. She called Rodriguez from a building next door, telling him that she had heard the remarks, was alone in the office with Morgan, and that she was afraid for her life. Rodriguez told complainant that Ester Turin would be there shortly, but when complainant returned to the office, she learned that Turin would not be in that day. Complainant called Rodriguez again, who said he would come to the office, which he did.

61. On October 13, 1995, Rodriguez transferred respondent Morgan to the AODS Lakeport office, effective October 16, 1995. The transfer was not, however, for disciplinary reasons or related to complainant's complaint. On October 13, 1995, Rodriguez notified complainant about the transfer.

62. On October 17, 1995, Rodriguez sent a "counseling report" memorandum to respondent Morgan, with a copy to Robert Erickson. A "counseling report" is not disciplinary action but, instead, is prefatory to possible future discipline should other incidents occur. In this October 17th memorandum, Rodriguez expressed "profound disappointment" in respondent Morgan's interactions and professional judgment during the previous six month period. Rodriguez also stated that he was "deeply distressed" by complainant's allegations, finding that Morgan's rationale for the car incident called into question his motives and "was not the kind of behavior or judgment" Rodriguez expected from any professional AODS employee. While Rodriguez stated that he was unable to determine who was at fault in the complained-of actions, Rodriguez also told Morgan that he had crossed both professional and personal boundaries. Rodriguez said that Morgan's actions represented "questionable judgement," prompting Rodriguez to reassign respondent Morgan to the Lakeport office with more direct supervision.

63. After October 17, 1995, complainant and respondent Morgan did not work together in the Clearlake office.

64. As a result of respondent Morgan's sexual conduct, complainant felt scared and helpless. She also felt betrayed by Morgan, used, and angry. Complainant experienced a loss of self-esteem and confidence in herself. She disassociated from her feelings, because they were so painful. When respondent Morgan became hostile to her, she also became afraid for her life, in part because of his criminal background and his threats about "getting even" with those who backed him into a corner.

65. As a result of Rodriguez's failure to promptly investigate and resolve her sexual harassment complaint, complainant was forced to continue working with respondent Morgan, despite her requests to be separated from him. This exacerbated complainant's anger and sense of worthlessness. She believed that she should have been able to resolve the matter by bringing it to her supervisor's attention, but instead came to feel that she was perceived as a "problem employee." She felt demeaned, insignificant and powerless. She also felt confused and suffered further loss of self-esteem.

66. Complainant's loss of self-esteem had physical manifestations. Shortly after respondent Morgan began his sexual conduct, complainant began to gain weight, resulting in a total weight gain of over 40 pounds. She developed other physical symptoms as well, which included pain in her jaw, neck, and stomach, grinding her teeth, and developing a rash on her stomach.

67. Respondent Morgan's sexual conduct and hostility, negatively impacted on complainant's ability to work. She became unable to concentrate on her work or complete her assigned tasks because she felt unsafe in her work environment, and helpless due to her unsuccessful attempts to improve the situation.

68. Respondent Morgan's conduct and Rodriguez's response to it also affected complainant's relationship with her family. She did not feel secure in her home. She also had difficulty interacting with her children, or helping them with school work. Complainant thought about committing suicide, but did not do so because she knew she had children to raise.

69. Complainant continued to visit Dr. Caroline Knowles periodically. In October 1996, Dr. Knowles diagnosed complainant with "major depression," caused by respondent Morgan's conduct and respondent Health Services' failure to support complainant. As of May 1997, Dr. Knowles continued to diagnose complainant as having "major depression," and found complainant so debilitated that Knowles recommended a disability leave. Dr. Knowles' diagnosis of "major depression" is the highest level of depression described in DSM III and DSM IV, reference books which provide diagnostic criteria.

70. At hearing, complainant was still distressed by the incidents alleged herein, crying and visibly shaken on the witness stand as she testified.

71 In February 1996, Lake County transferred complainant out of AODS and into the "special districts" office. Complainant worked at "special districts" until May 1997, and shortly thereafter moved to another county.

72 In January 1997, respondent Morgan voluntarily resigned his employment with respondent Health Services.

73 Respondent Health Services never took any disciplinary action against respondent Morgan as a result of complainant's sexual harassment charges.

#### DETERMINATION OF ISSUES

##### Liability

The Department alleges that: (1) respondent Morgan, an employee of respondent Health Services, subjected complainant to verbal, visual, and physical acts of sexual harassment; (2) respondent Health Services knew or should have known about respondent Morgan's conduct but failed to take immediate and appropriate corrective action; and (3) respondent Morgan retaliated against complainant by making threatening comments to her after she complained about the sexual harassment. The Department asserts that respondents thereby violated Government Code section 12940, subdivisions (a), (f), and (h)(1). The Department further asserts that respondent Morgan violated the Ralph Civil Rights Act, Civil Code section 51.7, as incorporated into the Act through Government Code section 12948, by subjecting complainant to violence, intimidation, and threats of violence because of her sex.<sup>1/</sup>

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<sup>1/</sup> In the First Amended Accusation, the Department also alleges that respondents violated Government Code section 12940, subdivision (a), by subjecting complainant to disparate treatment on the basis of her sex, and Government Code section 12940, subdivision (i), by failing to take all reasonable steps to prevent discrimination. Because the Department's Post-Hearing Brief does not ask for relief under either a disparate impact theory or for violation of subdivision (i), this decision will not determine whether

A. Sexual Harassment

The Department claims that respondent Morgan sexually harassed complainant in violation of Government Code section 12940, subdivisions (a), and (h)(1). Sexual harassment

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there were such violations of the Act.

constitutes discrimination "because of sex" within the meaning of the Act. (Gov. Code, §12940, subds. (a), and (h)(3)(C); Cal. Code of Regs., tit. 2, §§7287.6, subd. (b), and 7291.1, subd. (f)(1); Rojo v. Kliger (1990) 52 Cal.3d 65, 73, fn. 4 ; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, at p. 19 [1990 WL 312871; 1990-91 CEB 1]; DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03, at pp. 28-29 [1984 WL 54283; 1984-85 CEB 2].) If a preponderance of all the evidence demonstrates that unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex has occurred, that this conduct led to the deprivation of an employment benefit or benefits, and that respondents can be held liable for these actions, the Commission will determine that respondents have engaged in unlawful sexual harassment. There is no affirmative defense which would render sexual harassment lawful. (DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 19.)

1. Whether Unwelcome Sexual Conduct Occurred

The Department asserts that respondent Morgan subjected complainant to unwelcome sexual comments, advances, and a physical touching and continued to threaten her after she reported his sexual harassment. This behavior, if it occurred, constitutes the kind of hostile sexual conduct that may form the basis for a sexual harassment violation under the Act. (Cal. Code of Regs., tit. 2, §§7287.6, subd. (b)(1), and 7291.1, subd. (f)(1); Fisher v. San Pedro Peninsula Hospital, (1989) 214 Cal.App.3d 590,607-608; DFEH v. Bee Hive Answering Service (1984) FEHC Dec. No. 84-16, at p. 18 [1984 WL 54296; 1984-85 CEB 8].)

Complainant clearly and credibly testified that respondent Morgan engaged in recurrent instances of unwelcome sexual conduct toward her, as described in the Findings of Fact. Complainant testified that respondent Morgan made unwanted comments to her which were sexual in nature, including sexual comments about her body and the possibility of a sexual liaison between them. Complainant also credibly testified that Morgan put his hand up her dress and she rebuked him. In addition, complainant credibly testified that respondent Morgan's sexual overtures toward her ended by May 1995, but that thereafter, and until he was transferred in October 1995, respondent Morgan continued to use sexually derogatory language toward complainant and to threaten her.

Respondent Morgan asserts in closing argument that complainant wanted to have a relationship with him, and that he was not interested in her. Morgan's testimony at hearing and his earlier admissions, however, corroborate much of complainant's testimony. While Morgan claims that the car incident was "reverse psychology" designed to dissuade complainant's interest in him, Morgan admitted, both during Rodriguez's investigation and at hearing, that he had put his hand on complainant's thigh when they were in his car, and that she immediately rebuked him.

Moreover, on cross examination, Morgan revealed that he had "let his hair down" during his first year at AODS, and conceded that complainant could have construed his conduct to imply that he was "romantically inclined" toward her and interested in something more than a friendship. At hearing, respondent Morgan also admitted to other incidents, including the "cheesecake incident" and his use of the word "orgasm" at work.

It is therefore determined that respondent Morgan engaged in unwelcome sexual conduct toward complainant, as testified to by complainant and described in the Findings of Fact.

## 2. Deprivation of Discrimination-Free Work Environment

The Department argues that the unwelcome conduct complainant suffered deprived her of the benefit of a "discrimination-free workplace," a work environment free of harassment. (Cal. Code of Regs., tit. 2, §§ 7286.5, subds. (f), and (f)(3), and 7287.6, subd. (b).) Conduct of this kind which deprives its victims of this substantial benefit is itself unlawful under the Act, whether or not the conduct also results in loss of some more tangible employment benefit, such as a promotion, a pay increase, or the job itself. (Gov. Code, §12940, subd. (h)(1); Cal Code of Regs, tit. 2, §7287.6, subd. (b); Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d 590, 608; DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 20].)

Unwelcome sexual conduct deprives its victim of a discrimination-free work environment, within the meaning of the Act and our regulations, when the conduct is either sufficiently severe or sufficiently pervasive that the conduct creates an intimidating, oppressive, hostile, abusive, or offensive work

environment or otherwise interferes with the complainant's emotional well-being or her ability to perform her work duties. (Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at p. 590, 609, citing Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 67; DFEH v. Del Mar Avionics, (1985) FEHC Dec. No. 85-19 at p. 18 [1985 WL 62898; 1984-85 CEB 16]; Kelley-Zurian v. Wohl Shoe Company (1994) 22 Cal.App.4th 397, 412.) The objective severity of the harassment is judged from the perspective of a reasonable person in the complainant's position, considering all the circumstances. (Oncale v. Sundowner Offshore Services, Inc. (1998) \_\_\_ U.S. \_\_\_ [118 S.Ct. 998, 1003].) The Commission's inquiry is guided by "[c]ommon sense, and an appropriate sensitivity to social context." (Id. at 1003.).

Sexual harassment involves conduct, "whether blatant or subtle, that discriminates against a person solely because of that person's sex." (Accardi v. Superior Court (1993) 17 Cal.App.4th 341, 345.) Although the conduct is often clearly sexual, "the creation of a hostile work environment . . . need not have anything to do with sexual advances. . . . It shows itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance." (Id. at 348 (citations omitted).)

Respondent Morgan's harassment of complainant was severe, in that it involved lewd suggestions, offensive language, a physical touching, and extremely intimidating conduct. The conduct also was pervasive, in that it occurred over an extended period of time. From January through April 1995, respondent Morgan's actions toward complainant included sexual suggestions, sexual overtures, intimidating conduct, a physical touching, and sexually derogatory language, including the words "motherfucker," "tits," "pussy," and "bitch." Thereafter, while Morgan's overt sexual overtures ceased, his threatening and intimidating conduct escalated and he continued to use sexually derogatory language around complainant until he was transferred in October 1995. These sexually derogatory comments were tied to complainant's gender and contributed to the hostile environment which Morgan created. The use of "derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment." (Accardi v. Superior Court, supra, 17 Cal.App.4th 341, 348-9.) Further, Morgan's threats and hostile behavior toward complainant from

August 1995 through October 1995, was based, at least in part, on his knowledge that complainant had complained to Rodriguez about his sexual harassment.1/

Complainant was clearly upset, offended, oppressed, and humiliated by respondent Morgan's conduct. Respondent Morgan's conduct also clearly intimidated complainant. Morgan created an offensive work environment for complainant by making lewd suggestions and propositions to her, putting his hand inside her dress, referencing sexual acts and body parts, directing derogatory sexual comments at her and generally upsetting complainant's peace of mind. This so interfered with complainant's emotional well-being that she experienced a major depression with numerous physical ailments.

Respondent Morgan's unwelcome sexual and gender-based conduct and threats rendered complainant's work environment hostile, abusive and offensive. It is therefore determined that this unwelcome conduct which complainant suffered deprived her of a discrimination-free workplace within the meaning of the Act.

### 3. Employer Liability for Co-worker Sexual Harassment

The Department asserts that respondent Health Services is liable for the sexual harassment of complainant by her co-

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2/ The evidence showed that respondent Morgan's threatening conduct toward complainant from May through July was, at least in part, because she had complained about his Solis-related threats. Nonetheless, Morgan's conduct before and after that time period -- i.e., from January through April and from July through October -- was clearly sexual or related to complainant's sexual harassment complaint and was sufficiently severe and pervasive to create a hostile work environment within the meaning of the Act.

employee, respondent Morgan. The Act provides that an employer is liable for the sexually harassing conduct of its non-supervisory employees if the employer ". . . or its agents or supervisors knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Gov. Code, §12940, subd.(h)(1); DFEH v. Madera County, supra, 1990-91, CEB 1, at p. 24.)

The Commission's regulations also provide:

Proof of such knowledge [of the harassment] may be direct or circumstantial. If the employer or . . . its agents or supervisors did not know but should have known of the harassment, knowledge shall be imputed unless the employer . . . can establish that it took reasonable steps to prevent the harassment from occurring. Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned. (Cal. Code of Regs., tit.2, §7287.6, subd. (b)(3).)

a. Knowledge

The evidence is clear that Albert Rodriguez, as well as his supervisor, respondent Health Services Director Robert Erickson, were, in their capacity as agents and supervisors for respondent Health Services, aware of complainant's sexual harassment complaint and her great distress arising from respondent Morgan's conduct. While the parties dispute the date of complainant's first sexual harassment complaint to Rodriguez, this decision finds that complainant told Rodriguez about some of the harassment as early as April 1995.<sup>1/</sup> The parties do agree that, at the latest, by July 24, 1995, complainant had clearly

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<sup>3/</sup> Complainant credibly testified that she first informed Rodriguez about some of Morgan's sexual harassment during an April 1995 telephone call to Rodriguez. Respondent Health

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Services objects to testimony of complainant's husband, John Acker, which corroborates complainant's testimony. Because complainant's testimony about the April telephone call is credible, however, this decision does not rely upon the testimony of Mr. Acker.

informed Rodriguez that respondent Morgan had sexually harassed her and had complained about three specific incidents of harassment. Thereafter, complainant and Rodriguez had a number of discussions about respondent Morgan's conduct. Complainant also memorialized her complaints in several written memoranda to Rodriguez, and Rodriguez sent memoranda to Erickson which summarized what he had learned from complainant.1/

Respondent Health Services argues that, while it had knowledge of complainant's complaint, it could not confirm whether the sexual harassment occurred, because there was no corroboration. It is undisputed, however, that respondent Morgan admitted to Rodriguez that he touched complainant's thigh and she rebuked him.1/ Similarly, while his explanation differed from

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4/ The parties submitted numerous memoranda in this case which were admitted into evidence. This decision did not rely upon the memoranda admitted as Department Exhibits 14, 17, and 19, however, because it became apparent during hearing that these exhibits were only a recreation of documents, and the originals were never produced by the Department.

5/ Respondents assert that this incident was not an admission

complainant's, Morgan admitted that complainant's breasts had touched him when she was on her way to the filing cabinets and there had been some discussion about it. Thus, while the context of the conduct was not conceded, respondent Health Services had confirmation that some of the asserted conduct had occurred.

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because Morgan's rendition of exactly what happened in the car differs from complainant's version, although Morgan did not deny that he touched complainant and she rebuked him. Respondents also argue that the conduct is not relevant because it took place at the noon hour in Morgan's car. Under either complainant or Morgan's account of the events, however, there was an admitted sexual touching which clearly had a negative impact in the workplace. This admission, at a minimum, should have triggered a prompt investigation to deter future workplace harassment. (See, e.g., DFEH v. Fresno Hilton Hotel, *supra*, 1984-85 CEB 2, at p. 33 [unwelcome sexual conduct by co-employee which occurs elsewhere may result in hostile or oppressive work environment].)

Moreover, Rodriguez knew that respondent Morgan had engaged in previous questionable conduct in relation to other individuals and was aware that the relationship between complainant and Morgan was problematic. From his own investigation, Rodriguez knew that employee Susan Smith had seen complainant and Morgan engage in an "intense conversation" where they were in "close proximity" to each other. At hearing, Smith testified that Morgan had "cornered" complainant. Rodriguez also was aware that Morgan had already threatened two other women, Laura Solis and Taira St. John,<sup>1/</sup> and Morgan had admitted to Rodriguez that he had made comments similar to the threatening and sexually derogatory language reported in complainant's May memorandum. Thus, Rodriguez had corroboration of some of the conduct complained of by complainant, and certainly, considering the circumstances, had information sufficient to trigger a speedy investigation designed both to protect complainant from future harassing conduct and to deter Morgan from engaging in this type of conduct.

Finally, while no other witness personally observed respondent Morgan sexually harassing complainant, this is often

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<sup>6/</sup> At hearing, Rodriguez's testimony differed in significant ways from a number of other witnesses, including Taira St. John. In general, Rodriguez's testimony at hearing was less credible than that of other witnesses, in light of his demeanor, the character of his testimony, and the inconsistencies between his testimony and other evidence. In this instance, while Rodriguez claimed he knew only about respondent Morgan threatening to complain about St. John to the licensing board, St. John more credibly testified that she told Rodriguez how Morgan had personally threatened her.

the situation in sexual harassment cases. Here, the lack of others observing respondent Morgan's behavior is not particularly surprising, given that complainant and respondent Morgan were frequently alone in the Clearlake office. Notably, virtually every witness at hearing testified that, during 1995, complainant talked to each of them about respondent Morgan's conduct toward her.

It is therefore determined that respondent Health Services, through its agents and supervisors, Albert Rodriguez and Robert Erickson, had sufficient knowledge of respondent Morgan's conduct to trigger a prompt investigation and appropriate corrective action.

b. Immediate and Appropriate Corrective Action

The question, then, is whether respondent Health Services took immediate and appropriate corrective action after it learned of complainant's complaints and of Morgan's behavior. The Commission has previously held that:

The adequacy of an employer's response to a complaint of co-worker sexual harassment must be measured in each case against the fundamental purposes of the Act's sexual harassment prohibitions. In its original prohibition of sex discrimination . . . and in its subsequent specific enactments against harassment, . . . the Legislature has made clear its purpose to outlaw all forms of sexual harassment and to eliminate them from the workplace in California. To that end, the Legislature sought not only to provide an effective remedy for specific instances of harassment, but also to impose on employers an affirmative obligation to take steps to expunge such harassment from the workplace and prevent it from occurring in the future.

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If [the Commission finds] that an employer's response to notice or knowledge of co-worker harassment performs these same functions, then that employer will avoid liability for the harassment." (DFEH v. Madera County, supra, 1990-91, CEB 1, at p. 24-25.)

The Commission's determination on this issue will always depend on the particular circumstances involved but in each case the Commission will "inquire among other things, into what steps the employer took to investigate the charge, to remedy the situation if harassment is found to have occurred, and to keep the complainant protected from further harassment and informed both of her rights and of the employer's responsive actions." (Id.)

An employer has an obligation to take "prompt, effective action." (Cf. Fuller v. City of Oakland, 47 F 3d. 1522, 1528.) "Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment by the same offender or others." (Id.) Moreover, a fundamental part of an employer's obligation is "to make prompt, full, and fair investigation of all harassment complaints. Whether or not any harassment will be found to have occurred in a given incident is irrelevant. A full investigation, no matter what its outcome, will be a powerful deterrent to those who might be tempted to harass in the future, just as the failure to investigate, or an inadequate investigation, will surely increase their temptation." (DFEH v. Del Mar Avionics, supra, 1984-85 CEB 16, at 32.)

Here, the investigation was neither prompt nor effective. The Department asserts, and this decision finds, that complainant talked to Rodriguez about her complaint as early as April 1995, again in June 1995, and then again in July 1995. The record shows that Rodriguez did not complete his investigation until October 3, 1995, when he issued his final findings and recommendations, which was immediately after he received notice of complainant's DFEH complaint. Thus, over five months lapsed between the time complainant first talked to Rodriguez about Morgan's conduct and the time Rodriguez finished his investigation.

During this time period, Rodriguez did not take adequate steps to protect complainant, notwithstanding complainant's stated fear of Morgan. It is uncontested that complainant and respondent Morgan remained working together at the Clearlake office throughout this time, often alone, despite complainant's repeated requests to be transferred or otherwise separated from Morgan.

The record also shows that Rodriguez did not take effective steps to prevent complainant and Morgan from being alone in the office or otherwise have someone effectively monitor respondent Morgan's behavior. On August 8, 1995, Rodriguez's "solution" was to designate Ester Tarin as Clearlake office "lead" coordinator and assign Laura Solis to work at that office on Tuesdays. Tarin did not, however, have a full-time presence at Clearlake, because she continued to work at the Lakeport office on Mondays and Tuesdays. Like Tarin, Solis did not work full-time at Clearlake.

The efficacy of the investigation itself is also questionable. Rodriguez never followed up on some of complainant's allegations -- i.e., Rodriguez never talked to respondent Morgan or otherwise investigated the "cheesecake" and "bathroom-related" remarks.

Indeed, seeming inconsistencies in Rodriguez's own memoranda raise questions about his investigation. While Rodriguez's October 3rd final report did not find that sexual harassment occurred, Rodriguez's later October 17, 1995, memorandum to respondent Morgan suggests otherwise. In the latter memorandum, Rodriguez acknowledged his "profound disappointment" in respondent Morgan's "interactions and professional judgement" for the previous six months. Rodriguez stated that he was "deeply distressed" by complainant's allegations and acknowledged that Morgan had confirmed to Rodriguez that the car incident had occurred. Rodriguez concluded that Morgan's stated rationale for the car incident "calls into question your personal judgement and your motives" and "was not the kind of behavior or judgement I expected from you or any other purported professional employee within AODS."

Despite Rodriguez's concerns, however, he failed to take adequate remedial action. The record shows that the Clearlake office remained tense. In fact, Diane Askew testified that she and other co-workers took steps to stay away from the office or otherwise avoid the tension between complainant and Morgan. Rodriguez's October 3rd final report of findings and recommendations did not resolve matters between the parties. Three days after the report, Morgan again made threatening comments about complainant, and only then did Rodriguez finally transfer Morgan out of the office.

Through it all, however, Rodriguez took no disciplinary action against Morgan. Rodriguez expressly testified at hearing that Morgan's transfer out of the Clearlake office was not for disciplinary reasons and that he never disciplined Morgan for any of his conduct toward complainant.

In sum, the record shows that respondent Health Services conducted an inexcusably slow and ineffective investigation without adequately safeguarding complainant. Respondent Health Services failed to take "immediate and appropriate corrective action" regarding respondent Morgan's sexual harassment of complainant and respondent Health Services is therefore liable for the harassment in violation of Government Code section 12940, subdivisions (a) and (h)(1).

#### 4. Respondent Morgan's Liability

The Department also asserts that respondent Morgan is personally liable under the Act.

The question is whether respondent Morgan, a non-supervisory co-worker, can be personally liable under Government Code section 12940, subdivision (h), which provides that it is unlawful for an employer "or any other person" to harass an employee or applicant for employment. Government Code section 12925, subdivision (d), defines "person" to include one or more individuals. The appellate courts and the Commission have relied upon this section of the Act to hold supervisors liable for their own sexual harassment. (Matthews v. Superior Court of Los Angeles County (1995) 34 Cal.App.4th 598 ; Page v. Superior Court of Sacramento County (1995) 31 Cal.App.4th 1206; DFEH v. Del Mar Avionics, supra, 1984-85 CEB 16, at p. 25.) While these cases decided individual liability only in the context of supervisor harassment, their logic -- i.e., the use of the word "person" in Government Code section 12940 subdivision (h) -- applies equally to co-worker liability. Indeed, in DFEH v. Madera County, supra, 1990-91, CEB 1, at p.27-8, the Commission found a co-worker personally liable by reliance upon Government Code section 12925, subdivision (d), and Government Code section 12940, subdivision (h).)

Thus, respondent Morgan is found personally liable for his sexual harassment of complainant, in violation of Government Code section 12940, subdivision (h)(1).

B. Retaliation

The Department also alleges that respondent Morgan retaliated against complainant for her opposition to his sexual harassment, in violation of Government Code section 12940, subdivision (f). This subdivision was amended in 1987 to provide in pertinent part that it is unlawful for any "person . . . to otherwise discriminate against any [other] person because the [other] person has opposed any practices forbidden" by the Act. (Stats. 1987, c. 605, §1 [A.B. 1167].) 1/

To establish a violation under Government Code section 12940, subdivision (f), the Department must prove by a preponderance of the evidence that complainant engaged in a protected activity, that she suffered discrimination in the form of retaliation, and that a causal connection exists between the protected activity and respondent Morgan's action. (Gov. Code, §12940, subd. (f); Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at 614; DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 33; DFEH v. Cal. State University - Hayward (1988) FEHC Dec. No. 88-18, at pp. 20-22 [1988 WL 242650; 1988-89 CEB 6].)

The Department need not show that retaliatory motivation was the sole or even the principal reason for the adverse action. A violation is established if the action was caused at least in part by the unlawful motive. (Watson v.

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7/ While the First Amended Accusation alleges that both respondents violated Government Code section 12940, subdivision (f), in its Post Hearing Brief, the Department asserts only that respondent Morgan is liable under that section. Thus, this decision does not address whether respondent Health Services violated this subdivision.

Department of Rehabilitation (1989) 212 Cal.App.3d 1271, 1289-90  
[261 Cal.Rptr. 204]; DFEH v. Del Mar Avionics , supra, [1984-85  
CEB 16] at pp. 19-20.)

Here, there is a causal connection between complainant reporting Morgan's sexual harassment and respondent Morgan retaliating against her. The record shows that on July 25, 1995, Albert Rodriguez told respondent Morgan about complainant's sexual harassment complaint. Thereafter, respondent Morgan's hostility and threatening behavior toward complainant increased. Complainant credibly testified that respondent Morgan threw files on her desk, hovered over her desk and work area, and used a rude tone of voice, even after she asked him to stop doing these things. Complainant wrote a memorandum to Rodriguez on August 10, 1995, and another memorandum on August 31, 1995, to Rodriguez, Solis, and Tarin, documenting Morgan's retaliatory behavior. These memoranda stated that Morgan continued to "invade [her] space," with complainant remaining afraid and threatened by Morgan.

While respondent Morgan denies that he retaliated against complainant, at hearing he conceded that he contributed to an atmosphere of tension in the office and candidly admitted that his non-verbal conduct communicated his feelings that complainant had violated a trust. He also admitted that "definitely" his behavior would have let complainant know that he felt her charges were unsubstantiated. He also acknowledged that complainant could have interpreted his behavior as his being "furious" with her "[b]ecause she knew me by then . . ."

This testimony, along with Morgan's October 6, 1995, threatening comments, verify Morgan's retaliatory conduct. At hearing, complainant credibly testified that on October 6th, she overheard respondent Morgan use her name during a telephone conversation, stating he did not understand how complainant could "do this to him" and "that he was going to get this bitch for what she's done." Complainant further credibly testified that during the telephone conversation, Morgan said that he "didn't know how . . . [s]omehow, somehow, but he would find a way to get back at [complainant]." Complainant testified that she immediately called Rodriguez and relayed the overheard conversation to him. While respondent Morgan denied these remarks at hearing, he acknowledged that he was on the phone with an attorney seeking legal advice about defending himself against complainant's sexual harassment allegations against him and about filing his own counter suit. In a memorandum written by Albert Rodriguez about the incident, Rodriguez also acknowledged that

complainant was "emotional and distraught" when reporting the October 6th incident.

In sum, there is credible evidence to support a finding that respondent Morgan engaged in retaliatory conduct because complainant reported his sexual harassment, and that respondent Morgan discriminated against complainant within the meaning of the Act. Thus, respondent Morgan discriminated against complainant in violation of Government Code section 12940, subdivision (f), and is personally liable for a violation of that subdivision.<sup>1</sup>/

C. The Ralph Civil Rights Act/Government Code Section 12948

The Department asserts that respondent Morgan is liable for a violation of Civil Code section 51.7, the Ralph Civil Rights Act. Government Code section 12948 makes it unlawful, under the Fair Employment and Housing Act, for a person to violate Civil Code section 51.7.

Civil Code section 51.7 provides, in pertinent part:

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<sup>8</sup>/ The underlying analysis which results in individual liability for a violation of Government Code section 12940, subdivision (h), also applies to retaliation cases. (See, e.g., Page v. Superior Court, supra, 31 Cal.App.4th at 1212, which notes that the court in Fisher v. San Pedro Hospital, supra, "implicitly assumed" that the amendment adding the word "person" to Government Code section 12940, subdivision (f), "indicates a legislative intention that co-workers can be held liable for retaliation under FEHA." (See also Fisher v. San Pedro Hospital, supra, 214 Cal.App.3d at 615-16.)

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their ...sex....

When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light

of the "entire factual context," including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. (Cf. U.S. v. Orozco-Santillan (1990) 903 F.2d 1262, 1265; Lovell v. Poway Unified Sch. Dist. (1996) 90 F.3d 367, 371 and People v. M.S. (1995) 10 Cal.4th 698, 714.) The only intent requirement is that respondent "intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat." (U.S. v. Orozco-Santillan, supra, 903 F.2d at 1266, n. 3.) A threat exists if the "target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . [I]t is the perception of a reasonable person that is dispositive, not the actual intent of the speaker." (Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists (D. Or. 1996) 945 F.Supp. 1355, 1371.)

A violation of the Ralph Act, as incorporated into FEHA through Government Code section 12948, is established if a preponderance of all the evidence demonstrates that respondent Morgan engaged in threatening conduct toward complainant and that there is a causal connection between complainant's sex and this threatening conduct toward her. Sex need not be the dominant cause of respondent's threats. A violation is established if such a factor was any part of the motivation for respondent Morgan's conduct. (Cf. Watson v. Dept. of Rehabilitation, supra, 212 Cal.App.3d at 1289-90; DFEH v. Del Mar Avionics, supra, 1984-85 CEB 16, at pp. 19-20.)

The Department argues that respondent Morgan repeatedly threatened complainant because she objected to his sexual harassment and, citing complainant's August 10, 1995, memorandum, asserts that complainant was under extreme duress because of respondent Morgan's threats. While respondent Morgan does not specifically address the Ralph Act claim in his closing argument, he generally asserts that complainant's testimony is not credible and that he did not sexually harass complainant.

A review of the record supports a finding that after respondent Morgan learned complainant had lodged a sexual harassment complaint against him, Morgan engaged in both verbal and non-verbal conduct designed to intimidate and threaten complainant. The record supports a finding that this conduct

constitutes "intimidation by threat of violence . . . because of [complainant's] sex," because it was so intrinsically tied to respondent Morgan's sexual harassment of complainant and his subsequent anger when she reported him to Rodriguez. In light of respondent Morgan's previous actions and the surrounding circumstances of his behavior, these threats constitute a violation of the Ralph Civil Rights Act.

Prior to respondent Morgan learning about complainant's sexual harassment complaint, he made a number of threatening comments in complainant's presence. For example, when referencing his troubled relationship with coordinator Laura Solis, Morgan made comments like, "Where I come from people don't backstab you or else you'll be killed" and "I don't like being backed into a corner and when I am, I want to fight back." After Morgan learned that complainant had reported his Solis-related threats, his anger shifted to complainant. He threatened her, saying she did not understand the rules and, where he comes from, if an individual "snitch[es] on somebody, he gets even." These comments, some of which respondent Morgan admitted were "prison talk," clearly were threats of violence which frightened complainant considerably.

Given this background, Morgan's hostile and invasive conduct toward complainant beginning in August after he had discovered she had complained about his sexual advances, constituted "threats of violence" within the meaning of the Ralph Act. Complainant credibly testified that Morgan's hostile conduct increased after he learned about her sexual harassment complaint against him. For example, complainant testified that Morgan engaged in non-verbal hostile conduct when they were alone in the office, such as standing over her and generally invading her work space, but that Morgan ceased this behavior when others came into the office. Morgan's testimony corroborates complainant's testimony, in part, and does more than that, by demonstrating that he conscientiously decided to continue his threatening behavior, but in a manner for which he could not easily be held accountable. At hearing, Morgan indicated that Rodriguez told him not to retaliate against complainant in any way, and Morgan insisted that he did not verbally communicate his anger to complainant. Yet, by his own account, Morgan admitted he made it known by his demeanor, tone, and conduct that he was not a "happy camper" and "was furious" with complainant.

Morgan's conduct, designed to let complainant know that she had "violated a trust," was successful. Complainant's August 10, 1995, and August 31, 1995, memoranda make clear that she was terrified of Morgan and threatened by his conduct. Morgan's threatening remarks on October 6, 1995, and complainant's fearful reaction to them, show that complainant continued to be fearful of Morgan.

Placed in this context, respondent Morgan's post-July conduct constituted "threats of violence" within the meaning of the Ralph Act. Because the conduct was tied to complainant's reporting the sexual harassment, it is "because of sex" within the meaning of that Act.

Therefore, it is determined that respondent Morgan violated Government Code section 12948 by his violation of Civil Code section 51.7.

#### Remedy

Having established that respondents discriminated against complainant in violation of the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of such discrimination. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondents must demonstrate any bar or excuse they assert to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code of Regs., tit. 2, §7286.9; DFEH v. Madera County, supra, 1990-91 CEB 1, at pp. 33-34.)

In the Department's Post-Hearing Brief, it requested the following: 1) respondents be ordered to pay \$50,000 for compensatory damages resulting from emotional distress and suffering; 2) if the Commission orders respondent Morgan to pay less than \$50,000 for compensatory damages, then the Commission order respondent Morgan to pay an administrative fine which, when added to the compensatory damages, totals \$50,000; and 3) for the violation of the Ralph Act, the Commission order a \$25,000 civil penalty against respondent Morgan.

A. Compensatory Damages

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and co-workers. The Commission also considers the duration of the injury and the egregiousness of the discriminatory practice. (Gov. Code, §12970, subd. (b); DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at pp. 10-14 [1988 WL 242635; 1988-89 CEB 4].)

Respondent Morgan's conduct and respondent Health Services's inaction had both immediate and long term adverse effects on complainant, as described in the Findings of Fact. Complainant was treated by Dr. Caroline Knowles, a clinical psychologist whose extensive expert testimony in this case has been given great weight. Dr. Knowles, who had seen complainant periodically from 1989 through May 1997, found complainant to be "acutely stressed and depressed" in July 1995 and, by October 1996, diagnosed complainant with "major depression," the most severe form of depression according to DSM-III and DSM-IV. In Dr. Knowles' expert opinion, the cause of complainant's major depression was respondent Morgan's sexual harassment and respondent Health Services' failure to support her after she complained about the harassment.

Dr. Knowles testified that complainant's depression was characterized by an unbroken depressed mood, sleep disturbances and nightmares, loss of energy, and disturbance of appetite accompanied by "considerable" weight gain. Complainant also experienced headaches, upper abdominal pain, diarrhea, teeth

grinding, and other physical symptoms. Dr. Knowles found that complainant was "almost catastrophically tired and dragging herself through her day and through her duties..." and that complainant was having trouble "concentrating, thinking . . . handling things every day." According to Dr. Knowles, "just the idea of seeing Rodriguez or Morgan produced so much upset that it was traumatizing."

The evidence showed that complainant's personal integrity, dignity, and privacy also were significantly affected. The lack of support from respondent Health Services exacerbated the problem, leaving complainant feeling demeaned, insignificant, and powerless. Complainant's work also plainly was affected because her ability to concentrate was eroded, and her family relationships suffered, as she became unable to be the source of support she had previously been.

Complainant's distress also was exacerbated by respondent Morgan's retaliation against her for her filing a sexual harassment complaint. Dr. Knowles testified that after complaining about Morgan's behavior, complainant was "fearful of his vengeance." In light of respondent Morgan's background and his previous threats about "snitches," Morgan's retaliation plainly added a new dimension to the emotional distress suffered by complainant. Dr. Knowles also concluded, and so testified, that complainant's fearfulness was compounded by the lack of support from respondent Health Services.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), both respondents will be held jointly and severally liable for \$45,000 in damages for complainant's emotional distress arising from respondents' violation of Government Code section 12940, subdivision (a), and (h)(1), and this decision orders respondents to pay said amount to complainant. Respondent Morgan will be ordered to pay complainant an additional \$5,000 for emotional distress arising from his violation of Government Code section 12940, subdivision (f). Interest will accrue on this amount, at the rate of ten percent per year, compounded

annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)1/

B. Civil Penalty

The Department requests that the Commission order respondent Morgan to pay a \$25,000 civil penalty for his violation of the Ralph Act, as incorporated into FEHA by Government Code section 12948.

Government Code section 12970, subdivision (e), provides:

In addition to the foregoing, in order to vindicate the purposes and policies of this part, the [C]ommission may assess against the respondent if the accusation or amended accusation so prays, a civil penalty of up to twenty-five thousand dollars (\$25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code [the Ralph Civil Rights Act], as an unlawful practice prohibited by [FEHA].

This civil penalty is in addition to the payment of compensatory damages and administrative fines described in Government Code section 12970, subdivision (a)(3).

Here, a civil penalty is appropriate to vindicate the purposes and policies of the Act. Plainly, the Ralph Act, as incorporated into FEHA, was designed to protect employees from gender-based threats of violence or intimidation (Cf. Civ. Code, §51.7) and to ensure that worksites are free from harassment and discrimination. (Stats. 1984, ch. 1754, §1, p. 1170.) In this case, a civil penalty vindicates these purposes. The threatening conduct which formed the basis of respondent Morgan's Ralph Act violation created a work environment laden with gender-based

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9/ In light of this award, this decision will not order respondent Morgan to pay any administrative fine.

hostility. Accordingly, pursuant to Government Code section 12970, subdivision (e), respondent Morgan will be ordered to pay \$5,000 as a civil penalty for his violation of the Ralph Civil Rights Act, as an unlawful practice under FEHA.

C. Affirmative Relief

In addition to the above, it is ordered that respondent Health Services permanently post in a conspicuous place a notice of employees' rights and obligations with regard to unlawful discrimination under the Act. (Attachment B.) Respondent Health Services also will be required to post for a period of 90 days a notice acknowledging its unlawful conduct toward complainant. (Attachment A.)

ORDER

1 Respondents Lake County Department of Health Services and Robert Morgan shall immediately cease and desist from harassment and discrimination based on sex.

2. Within 60 days of the effective date of this decision, respondents Lake County Department of Health Services and Robert Morgan shall pay to complainant Karen Michelle Acker actual damages for emotional distress in the amount of \$45,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year. Respondents Lake County Department of Health Services and Robert Morgan are jointly and severally liable for this payment.

3. In addition to the payment enumerated above in section 2 of this order, within 60 days of the effective date of this decision, respondent Robert Morgan shall pay to complainant Karen Michelle Acker actual damages for emotional distress in the amount of \$5,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

4. Within 60 days of the effective date of this decision, respondent Robert Morgan shall pay to complainant Karen

Michelle Acker a civil penalty in the amount of \$5,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

5. Within 10 days of the effective date of this decision, an agent for respondent Lake County Department of Health Services, shall sign notices which conform to Attachments A and B of this decision and shall post clear and legible copies of these notices in a conspicuous place where employees view employee notices. Posted copies of these notices shall not be reduced in size, defaced, altered, or covered by other material.

The notice conforming to Attachment A shall be posted for a period of 90 working days. All copies conforming to Attachment B shall be posted permanently.

6. Within 100 days of the effective date of this decision, respondents shall in writing notify the Department and the Commission of the nature of their compliance with sections two through five of this order. Respondents shall also keep the Department and Commission notified of any change of address and telephone number until payment of any judgment has been enforced.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

DATED: July 10, 1998

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Jo Anne Frankfurt  
Hearing Officer

Attachment A

NOTICE TO ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WITH

Lake County Department of Health Services

posted by Order of the  
FAIR EMPLOYMENT AND HOUSING COMMISSION  
an agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that a former employee was sexually harassed, in violation of the Fair Employment and Housing Act, and that the Lake County Department of Health Services is liable for this harassment. (DFEH v. Lake County Department of Health Services, et al. (1998) FEHC Dec. No. 98-\_\_.)

As a result of this violation, we have been ordered to post this notice, and to take the following actions:

- a. Pay a monetary award to the complainant for damages for emotional distress caused by the harassment.
- b. Post a statement of employees' rights and remedies regarding harassment under the Fair Employment and Housing Act.

DATED:

BY

\_\_\_\_\_  
[Name], [Title]  
Lake County Department  
of Health Services

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

Attachment B

LAKE COUNTY DEPARTMENT OF HEALTH SERVICES

HARASSMENT

YOUR RIGHTS AND REMEDIES  
under the  
CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT PROHIBITS HARASSMENT BECAUSE OF RACE, RELIGIOUS CREED, COLOR, NATIONAL ORIGIN, ANCESTRY, PHYSICAL AND MENTAL DISABILITY, MEDICAL CONDITION, MARITAL STATUS, SEX AND AGE. YOU HAVE THE RIGHT TO BE FREE OF ALL SUCH HARASSMENT IN YOUR WORKPLACE.

SUCH HARASSMENT may take various forms, including:

- VERBAL CONDUCT such as epithets, derogatory comments, slurs, unwanted sexual advances, invitations or comments
- VISUAL CONDUCT such as derogatory posters, cartoons, drawings or gestures
- PHYSICAL CONDUCT such as assault, blocking normal movement, or interference with work directed at you because of your sex or other protected basis
- THREATS AND DEMANDS to submit to sexual requests in order to keep your job or avoid some other loss, and offers of job benefits in return for sexual favors
- RETALIATION for having resisted or reported the harassment

The law prohibits any form of protected-basis harassment that impairs your working ability or emotional well-being at work. You may have a claim of harassment even if you have not lost your job or some other benefit.

ALL EMPLOYEES ARE PROHIBITED FROM HARASSING, not just supervisors.

YOU HAVE THE RIGHT TO COMPLAIN ABOUT SUCH HARASSMENT AND GET RELIEF.

Lake County has a policy against harassment which is posted next to this Notice. If you think you are being harassed on the job because of your sex, race, ancestry or other protected basis, you should use the procedures outlined in this policy to file a complaint and have it investigated.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such harassment in employment. If you think you are being harassed or that you have been retaliated against for resisting or complaining about harassment, you may file a complaint with the Department at:

Department of Fair Employment and Housing  
San Francisco District Office  
30 Van Ness Avenue, Suite 3000  
San Francisco, CA 94102-6073  
415-557-2006  
or 1-800 884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the harassment stopped and can require your employer to reinstate you and to pay back wages and other out-of-pocket losses, damages for emotional injury, administrative fines or punitive damages, and other appropriate relief.

DATED:

BY

\_\_\_\_\_  
[Name], [Title]  
Lake County Department of  
Health Services

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.